

Cite as Det. No. 02-0134, 24 WTD 129 (2005)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of)	<u>D E T E R M I N A T I O N</u>
Interpretation of)	
)	No. 02-0134
)	
...)	Registration No. . . .
)	10/10/2001 TI&E Letter
)	Docket No. . . .
)	

[1] RULE 263; RCW 82.08.02567: RETAIL SALES TAX – ELECTRICITY – WIND – ROAD. The sale or charge for a road is not a charge “for the labor and services rendered in respect to installing the equipment” at a facility generating electricity using wind.

[2] RULE 263; RCW 82.08.02567: RETAIL SALES TAX – ELECTRICITY – BUILDING. Charges for an operations and maintenance building were not exempt as a control building under Rule 263(2)(a)(ii).

Headnotes are provided as a convenience for the reader and are not in any way a part of the decision or in any way to be used in construing or interpreting this Determination.

NATURE OF ACTION:

An organization generating electricity from wind requests exemption of construction charges for roads necessary to access its wind turbine towers and charges for a maintenance building that houses controls for the facility.¹

FACTS:

M. Pree, A.L.J. -- . . . (taxpayer) generates electricity in Washington, which it sells to utility companies who sell to consumers. The taxpayer contracted with a corporation to construct a wind generating facility in Washington. The taxpayer wrote the Department’s Taxpayer

¹ Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

Information and Education Section (TI&E) inquiring whether purchases and payments it made under the contract were exempt from retail sales or use tax. TI&E found wind turbines, towers, and other equipment and parts exempt, but instructed the taxpayer to pay sales tax on payments for access roads and a building. The taxpayer petitioned for correction of TI&E's instruction.

The taxpayer designed a wind generating facility, and entered a lease to use an undeveloped area on a remote ranch in a windswept location in Washington. The taxpayer listed the specifications, then solicited bids on the project. According to the taxpayer, the project constituted "turnkey" construction services for a facility to generate electricity from the wind, which included machinery, equipment, and access roads. The facility's anticipated output of electricity exceeded [200] kilowatts, an amount sufficient for the statutory exemption of sales and use tax. The taxpayer awarded the contract to build the entire facility to a single corporation for a fixed price. The taxpayer paid 20% down with the balance due 30 days after the contractor invoiced the taxpayer. In addition to valuing the turbines and foundations, the contract identified 7.5% of the payments as "Upgrade/construct roads."

The taxpayer states roads needed to be built on the ranch to install the towers and turbines at their designated sites. The turbines and towers were heavy, but broken down into two or three components, the towers and turbines could be transported over public roads. The contract specifications called for 20 foot-wide permanent gravel roads of sufficient strength to support the needs of cranes and other vehicles needed to deliver and install the turbines as well as to periodically service them. The roads widen at each tower site, in a manner that may allow a crane to straddle the tower or unload heavy machinery.

The contract also provides for an "operation and maintenance" (O&M) building. Most of the 80' by 60' building consists of a storage and work area. The building also contains offices, rest rooms, a test lab, and a 100 square foot room, which houses the facility's control equipment. The taxpayer's petition refers to the O&M building as a control building.

TI&E states the exemption from sales tax is limited to industrial fixtures, devices, and support facilities that are integral and necessary to the generation of electricity. Neither roads, nor the O&M building qualify for the exemption. The statute expressly excludes buildings from the exemption. The taxpayer contends because the roads were necessary for the installation of the turbines, the charges for the roads qualify for the exemption. The taxpayer notes the Department's Rule expressly allows the exemption for control buildings. The taxpayer also contends that the Department historically does not bifurcate payments under a single contract, but rather considers the predominant nature of the contract.

ISSUES:

1. Are charges for road construction rendered in respect to installing wind turbine generators, and exempt from retail sales tax?
2. Are charges for the O&M building, which houses the controls for the project, exempt?

DISCUSSION:

[1] Sales tax does not apply to sales of machinery and equipment used directly in generating electricity using wind as the principal source of power. RCW 82.08.02567.² Also exempt are sales of or charges made for labor and services rendered in respect to installing such machinery and equipment. *Id.* It is undisputed that the taxpayer contracted to develop a facility capable of generating enough energy to qualify for the exemption.³ Our first issue involves whether the charges for the road were for services rendered in respect to installing wind turbines.

The taxpayer states without the roads the turbines could not be installed. The taxpayer required the road construction as part of the same contract. The specifications for the road required a road sufficient to transport the turbines and towers as well as the equipment to install them. However, we consider the charges were for the roads themselves, and distinguish road charges from installation charges.

The progress check lists, specifications, and payment schedules all contemplate that the contractor would use roads to install the towers, turbines, and generators. They also indicate that the roads will continue to be used by the taxpayer after the contractor completes the project. The specifications require twenty-foot wide permanent roads requiring minimal long-term maintenance. The payment schedule itemizes 7.5% of the contract for “upgrade/construct” roads (and calls for valuing the percentage of road completion bi-weekly). We also note attachment B of the pricing schedule called for a break down out of the base line bid (lump sum) of the roads as well as the O&M building. While the road may have been necessary for the installation of the towers, turbines, and generators, the road charges were not installation charges.

² RCW 82.08.02567 provides in part:

(1) The tax levied by RCW 82.08.020 shall not apply to sales of machinery and equipment used directly in generating electricity using fuel cells, wind, sun, or landfill gas as the principal source of power, or to sales of or charges made for labor and services rendered in respect to installing such machinery and equipment, but only if the purchaser develops with such machinery, equipment, and labor a facility capable of generating not less than two hundred watts of electricity and provides the seller with an exemption certificate in a form and manner prescribed by the department. The seller shall retain a copy of the certificate for the seller's files.

(2) For purposes of this section and RCW 82.12.02567:

(b) "Machinery and equipment" means industrial fixtures, devices, and support facilities that are integral and necessary to the generation of electricity using wind, sun, or landfill gas as the principal source of power;

(c) "Machinery and equipment" does not include: (i) Hand-powered tools; (ii) property with a useful life of less than one year; (iii) repair parts required to restore machinery and equipment to normal working order; (iv) replacement parts that do not increase productivity, improve efficiency, or extend the useful life of machinery and equipment; (v) buildings; or (vi) building fixtures that are not integral and necessary to the generation of electricity that are permanently affixed to and become a physical part of a building;

³ The taxpayer's facility was expected to generate [in excess of two hundred watts of electricity] . . . [T]he statute only required two hundred watts of electricity.

We recognize RCW 82.08.02567 provides an exemption for much of the taxpayer's equipment as well as for sales of or charges made for the labor and services rendered in respect to installing the equipment. Eligible installation charges would include activities such as bolting down equipment, lifting or erection services. The taxpayer's contract charge is for a road, a permanent asset, which is expected to exist after it is constructed. The taxpayer expects to use the road for future access to service the turbines. The amount charged is separately identified as a road charge. Two related factors render the road ineligible. First and foremost, constructing a road that is used to haul items and used as a base from which to install equipment does not fall within the scope of the exemption because the sale or charge for a road is not a charge "for the labor and services rendered in respect to installing the equipment."

Constructing a road is described in RCW 82.04.050 (2)(b). The statute specifies "installing," in RCW 82.04.050(2)(a). This language is in regards to equipment eligible under the exemption. The activity of installing equipment does not cover tangential or related yet indirect activities, such as building a road. The road is arguably necessary for the installation of equipment, but constructing the road is a separate activity from installing equipment. Also, constructing the road is not in and of itself the installation of equipment because the road is not eligible equipment. The road is used for travel, transport, and access. These are not qualifying uses under the "used directly" test in RCW 82.08.02567.

The taxpayer asserts the entire project should qualify for the exemption because the taxpayer contracted with a single contractor to provide a complete wind generation facility. The taxpayer contends the Department will not bifurcate payments due under a single contract.

In general, the Department does not allow a single billing or contract to be segregated or bifurcated unless there is a reasonable basis on which to do so. In Det. No. 98-012, 17 WTD 247 (1998). As we stated in Det. No. 89-433A, 11 WTD 313, 316 (1992), we taxed the activities separately because the taxpayer's contract, which was negotiated before the work was performed, provided a reasonable basis for determining the value of the various activities performed. . . .

The taxpayer's bid process requires contractors to break down their bid, taking out the value of roads as well as the O&M building in the "Attachment B" pricing schedule. The "Attachment B" pricing schedule provides a reasonable basis for determining the value of the roads and O&M building. Bifurcation is appropriate.

[2] The taxpayer contends its O&M building was a control building specifically qualified for exemption under (WAC 458-20-263)(2)(a)(ii) (Rule 263(2)(a)(ii)):

(ii) "Machinery and equipment," where wind is the principal source of power, includes, but is not limited to: Turbines; blades; generators; towers and tower pads; substations; guy wires and ground stays; control buildings; power conditioning equipment; anemometers; recording meters; transmitters; power poles; power lines; and connectors to the utility grid system.

We note the statute, RCW 82.08.02567 specifically (2)(c)(v) specifically excepts buildings from the exemption.

We must interpret and apply the Rule within this statutory limit. To adopt taxpayer's interpretation would expand the definition contained in the statute. Administrative rules cannot alter or amend the law they implement. *Coast Pacific Trading, Inc. v. Department of Rev.*, 105 Wn.2d 912, 917, 719 P.2d 541 (1986). The Department of Revenue is without authority to grant tax exemptions or deductions or to expand them beyond the express statement of statutory law. See *Budget Rent A Car v. State*, 81 Wn.2d 171, 176, 500 P.2d 764 (1972).

Rule 263 uses the term “control building” to identify a stand alone structure that houses the switch gear used to control the output of the generators. Given the express statutory language excepting “buildings” from machinery and equipment qualified for the exclusion, the structure identified in Rule 263 must be exclusively used for this purpose, and may not be used for normal building purposes.

The taxpayer’s O&M building consists primarily of storage and repair space. It has offices and rest rooms. The control room in the O&M building occupies 100 square feet, while the main floor of the building alone is 4,800 square feet. The O&M building is not the type of structure contemplated as a “control building” in Rule 263(2)(a)(ii). The charges for the O&M building are not exempt from sales tax.

DECISION AND DISPOSITION:

We deny the taxpayer’s petition.

Dated this 15th day of August 2002.